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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 643.

UNITED STATES OF AMERICA,
Petitioner,

vs.

W. V. KNOTT, as State Treasurer and ex officio Insurance Commissioner of the State of Florida, and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY,
Respondents.

BRIEF OF RESPONDENT, CARL K. WITHERS, AS COMMISSIONER OF BANKING AND INSURANCE OF THE STATE OF NEW JERSEY, AND LIQUIDATOR OF THE NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY.

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Statement of Question Involved.

I. Is the priority granted the United States of America under Section 3466 of the revised statutes (Comp. St. Sec. 6372) applicable to an Ancillary Receivership not comprising the domiciliary or primary assets of the insolvent?

Statement of Case.

The statement of case given in the petition for writ of certiorari is accurate, but for the better information of the

Court the following additional facts, apparent in the record, should be stated:

I. The motion filed by WILLIAM H. KELLY, as Commissioner of Banking and Insurance of the State of New Jersey, (R. 4), to amend the bill of complaint in the *original suit* which he, the predecessor in office of this respondent, instituted, was not filed in recognition of any priority granted THE UNITED STATES OF AMERICA by virtue of Section 3466 of the Revised Statutes (Comp. St. 6372). It is apparent from the motion that the judgments excepted from the prayer of the bill, and subsequently excepted from the injunctive order, were, (a) a judgment rendered by the Circuit Court of the Seventeenth Judicial Circuit in and for Orange County, Florida, in favor of one R. E. Hinshaw, and not THE UNITED STATES OF AMERICA, in which case an order had been entered to require the State Treasurer to sell sufficient of the securities of THE NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, on deposit in Florida, to pay said judgment, and (b) judgments in favor of THE UNITED STATES OF AMERICA, of which notices had been served under Sections 6302-3 of the Compiled General Laws of Florida, 1927, set forth in the appendix, pages 10-13, of the petition for writ of certiorari filed by THE UNITED STATES OF AMERICA.

Argument.

The respondent, CARL K. WITHERS, successor in office to WILLIAM H. KELLY, as Commissioner of Banking and Insurance of the State of New Jersey, objected to the claims of the petitioner, THE UNITED STATES OF AMERICA, in the *nisi prius* court, on October 20, 1934, (R. 251), and asserted

then, and asserts now, that the claims of THE UNITED STATES OF AMERICA should not be allowed to participate in the distribution of the Florida fund, for the following separate reasons:

1. It affirmatively appears that all of the assets of THE NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY were not, and are not, located in the State of Florida.

2. It affirmatively appears that THE NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY has not made a general assignment of all of its assets in the State of Florida.

3. It affirmatively appears that the assets under administration in Florida do not comprise effects of an absconding, concealed, or absent debtor under attachment.

4. It affirmatively appears that THE NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY has not committed an act of bankruptcy in Florida.

5. It affirmatively appears that THE NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY has not had its principal place of business in Florida for the greater portion of six months' next preceding the institution of the original suit.

6. The surplus of the Florida fund, if any exists after the payment of the claims entitled to participate therein, should be remitted to the principal liquidator in New Jersey.

7. The Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, in which the original suit

was filed by this respondent's predecessor in office, was without jurisdiction to administer the surplus after the payment of the claims of creditors entitled to participate therein.

The Limitations of the Federal Priority Statute.

The Supreme Court of the United States has held that the Federal priority statute, Section 3466 of the Revised Statutes (Comp. St. Sec. 6372), is applicable only when the insolvency of the estate is manifested in one of the modes specified in the act and not otherwise:

> "In order to give the priority specified in section 3466, there must be a case of an insolvent debtor who makes a voluntary assignment of his property, or a case in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, or a case in which an act of bankruptcy is committed."
>
> *United States* v. *State of Oklahoma,* 261 U. S. 253, 43 Sup. Ct. 295.

No contention is made, or can be made, that THE NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY made an assignment of its assets, for assignment means a *general assignment.*

> *Commonwealth* v. *Phoenix Bank,* 11 Metc. 129, 151 (Mass.);
> *Equitable Trust Co. of N. Y.* v. *Connecticut Brass & Mfg. Corporation,* 290 F. 712;
> *Davis* v. *Miller-Link Lumber Co.,* 296 F. 649.

Chief Justice JOHN MARSHALL said:

> "The word 'property' is unquestionably all the property which the debtor possesses; and the word 'thereof' refers to the word 'property' as used, and can only be satisfied by an assignment of all the property of the debtor."
>
> *The United States* v. *Hooe, et al.*, 3 Cranch. 73.

It is the position of this respondent that the priority of the Federal statute can be applied only in New Jersey, for in New Jersey, if in any place, a *general assignment* took place. The assets in Florida comprise only a small part of all of the assets of THE NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY (R. 306, *et seq.*).

A District Court, administering a *portion* of the assets of an insolvent estate, has disallowed priority under the Federal Statute.

> *Manhattan Rubber Mfg. Co.* v. *Lucey Mfg. Corporation*, 26 F. (2d) 839.

Reason dictates that it is necessary that all of the claims of the UNITED STATES OF AMERICA against THE NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, in all the jurisdictions in which the insolvent surety company has been doing business, should be marshaled, to the end that the priority may be properly recognized.

It has not been contended, and cannot be, that THE NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY in Florida was an absconding, concealed or absent debtor, under attachment by process of law. Nor has it been contended that THE NEW JERSEY FIDELITY AND PLATE GLASS

INSURANCE COMPANY in Florida committed an act of bankruptcy.

It cannot be urged that the National Bankruptcy Act, July 1, 1898 (c. 541, Par. 3, 30 Stats. 546, Sec. 3-a, Sub. 4, Comp. St. 9587), is applicable, in that "while insolvent, a receiver or trustee has been appointed, or put in charge of his property," since the Florida receiver had charge only of the Florida assets, which comprised only a fractional portion of all of the property of THE NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, and certainly THE NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY itself was not amenable to bankruptcy; it was an insurance company (National Bankruptcy Act, as amended February 11, 1932, c. 38, 47 Stats. 47; May 15, 1935, c. 114, Par. 1, 49 Stats. 246), and it did not have its principal place of business anywhere in Florida for the six months preceding the appointment of the receiver, or at any time.

Clearly the Federal priority statute is applicable only to the domiciliary liquidation.

For the very reason that the Federal priority Statute should be respected, the surplus of the Florida fund after the payment only of such claims of Florida citizens as had judgment liens against the Florida fund, fixed by State Statute, should be remitted to the domiciliary liquidation where it is subject to administration by this respondent. The effect of the payment of the government claims in Florida would be to deny the priority granted by the Federal statute, if the court should hold that the priority statute is applicable to claims of the nature of the government's claims in Florida.

The Jurisdiction of the Court.

It is the contention of this respondent that the surplus of the Florida fund, after the payment of the claims of all citizens of Florida entitled to priority, admittedly constitutes general assets and certainly the general assets should be remitted to the domiciliary liquidator.

In Great Western, etc. v. *Harris,* 198 U. S. 561;
Sterritt v. *Second National,* 248 U. S. 73.

The State of Florida is powerless to administer these. Since Florida cannot administer the general assets for priority claims or for any other purpose, the court is without jurisdiction to administer these.

Conclusion.

WHEREFORE, this respondent maintains that the government is not entitled to participate in the Florida fund and after the payment of all claims of Florida citizens entitled to participate therein, the surplus of the fund should be remitted to New Jersey, where the government's claims may and have been presented (R. 298).

The petition should be denied.

Respectfully submitted,

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